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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MICHAEL MAY,

4 Plaintiff,

New York, N.Y.

5 v.

18 Civ. 2238 (LAK) (RWL)

6 DESTINY HOPE CYRUS, *et al.*,

7 Defendants.

8 -----x

Argument

9 January 8, 2019
2:05 p.m.

10 Before:

11 HON. ROBERT W. LEHRBURGER,

12 Magistrate Judge

13
14 APPEARANCES

15
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1 (Case called)

2 THE DEPUTY CLERK: Attorneys, please state your name
3 for the record.

4 MS. SQUILLACE: Good afternoon, your Honor, and Happy
5 New Year. JoAnn Squillace, from the law office of Drummond &
6 Squillace, for the plaintiff Michael May. Good afternoon
7 again, your Honor.

8 THE COURT: Good afternoon.

9 MR. GARY: Good afternoon, your Honor. From Florida,
10 Willie Gary, for the plaintiff. Happy New Year.

11 THE COURT: Okay. Good afternoon.

12 MS. PAUL: Good afternoon, Judge. Marcia Paul, here
13 together with Jim Rosenfeld and Meredith Santana, from Davis
14 Wright Tremaine, for the defendants in the action.

15 THE COURT: Okay. Good afternoon.

16 We are here on a motion to dismiss in this copyright
17 case. I want the parties to know that I have thoroughly
18 reviewed the briefs and the papers, and I really actually want
19 to go through an agenda of questions that I have. You are
20 certainly free to add other things in along the way that you
21 think I should know, but I think there are some important
22 questions to be asked here.

23 I would actually like to start with the plaintiff,
24 even though it is the defendant's motion.

25 My first question, and a very important issue, I

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1 think, is exactly what you are alleging. I am referring
2 specifically to paragraph 69 of the second amended complaint.
3 What I am trying to understand -- and I think defendants have
4 given their own gloss on this as to their understanding -- what
5 exactly is it that Mr. May originated or created? And what I
6 mean more specifically is, did the phrase "Wi run tings" --
7 where "we" is spelled w-i -- "tings nuh" -- N-U-H -- "run wi,"
8 W-I. Did that phrase exist before Mr. May created his phrase?
9 In other words, did he adapt it by sort of English-izing it, if
10 you will, or is it your contention and does the second amended
11 complaint contend, allege that Mr. May actually originated the
12 phrase, in full Jamaican patois, "Wi run tings, tings nuh run
13 wi"?

14 MS. SQUILLACE: Thank you, Judge.

15 It is plaintiff's contention that he, in 1981, as a
16 disc jockey with Rango Mango International and that sound
17 system where he performed musical sets, he originated and
18 created the lyrical phrase which is protected by copyright law
19 "we run things, things no run we."

20 Now, those specific words mixed together, the English
21 words mixed together with the intentionally grammatically
22 incorrect sequence of the words, which comes from patois, he is
23 not using patois words. He is using English words mixed with
24 the intentionally grammatically incorrect sequence that the
25 Jamaican patois language lends itself to, to originate this

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1 creative, unique, and original phrase, "We run things, things
2 no run we."

3 THE COURT: But do you concede that the Jamaican
4 patois phrase "Wi run tings, tings nuh run wi" existed prior to
5 Mr. May originating his phrase?

6 MS. SQUILLACE: Absolutely not, Judge. We are not.
7 And, in fact, when you look at the defendants' moving and reply
8 papers, nowhere do they assert, allege, or provide any proof in
9 admissible form that in fact that phrase, either the way
10 Mr. May originated it or in strict Jamaican patois language,
11 was existing before 1981 nor that anybody else other than
12 Mr. May originated it or created it before 1981 or since. All
13 of the citations that defendants cite to are post 1981 and post
14 1988, publications, such as an article and a book, and nowhere
15 in their papers do they allege that the author of that article
16 created the phrase or that the author of that book created the
17 phrase. And the law is clear, just because something may be in
18 the public domain after it is created doesn't mean that an
19 infringement did not occur. And so we absolutely do not
20 concede that that phrase, even in the strict Jamaican patois,
21 existed prior to Mr. May.

22 The other thing, Judge, which is crucial to this
23 12(b)(6) motion, is that on the pleadings 12(b)(6) motion to
24 dismiss, the issue of originality, creation, and authorship
25 cannot be decided, most respectfully, by this court. The only

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1 issue that can be decided by this court on this motion is the
2 issue of fair use.

3 THE COURT: Well, protectability is also an issue that
4 can be determined by this court. Indeed, there are cases that
5 have -- other cases that have granted motions to dismiss as
6 opposed to, say, summary judgment on claims where a phrase is
7 alleged to have been the infringing element.

8 MS. SQUILLACE: The only cases in all of the cases
9 cited by the defendants are all summary judgment and trial
10 cases, Judge. None of them are 12(b)(6) pleadings. That is
11 why the only issue that, on the 12(b)(6) motion to dismiss, can
12 be decided by this honorable court as a matter of law is
13 whether the use of defendants taking plaintiff's lyrics is a
14 fair use and thus protected and thus not an infringement or
15 not. That's the only issue. Everything else is for a jury to
16 decide.

17 And even with that, Judge, at most and at best, all
18 defendants' papers have done, if you even give it that weight,
19 is show that there are genuine issues of material fact in
20 dispute that, again, warrants a denial for any holding to be
21 held as a matter of law on the 12(b)(6) motion to dismiss.

22 All plaintiff has to do, as required by the Federal
23 Rules of Civil Procedure, is plead with specific detail, which
24 plaintiff does, facial plausible facts, which plaintiff does,
25 and we have to give defendants fair notice of what his claims

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1 are, and plaintiff does more than enough of that.

2 The other issue with originality and the authorship of
3 the phrase, Judge, is that we have submitted proof in
4 admissible evidentiary form, both as an exhibit to the summons
5 and complaint as well as attached to our memorandum of law and
6 opposition, the sworn affidavits of Mr. Cleveland Browne, Nigel
7 Lloyd, Junor Bryan, and Cyril Nelson that all attest, under
8 penalties of perjury, that in 1981 he created this phrase.
9 Again, defendants, in their moving papers and reply papers, do
10 nothing to rebut that, dispute that, contradict that, or show
11 an authorship by anybody else at any time prior to 1981. And
12 based on those reasons, their motion to dismiss should be
13 denied.

14 THE COURT: Do you agree that some of those
15 attachments, which I agree are articles or otherwise or sources
16 such as Jamaican proverbs and such, would it -- well, you tell
17 me, do you agree that some of those do indicate that the phrase
18 is actually an old Jamaican proverb? Is that something, again,
19 you dispute or you agree with or --

20 MS. SQUILLACE: No, Judge. We dispute that
21 wholeheartedly.

22 THE COURT: Let me ask you this, then. One of the
23 documents, that I -- I think among those attachments there is a
24 document that you and your client refer to in your own papers,
25 and that's the Gleaner publication, where there is a discussion

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1 of Flourgon -- that's Mr. May's performance name -- and in it
2 there is an interview of counsel for Mr. May from Drummond &
3 Squillace, which is your firm, right?

4 MS. SQUILLACE: Yes.

5 THE COURT: And the article says that the phrase "We
6 run things, things no run we" became commonly used in Jamaica.
7 Is that a statement that you made and agree with?

8 MS. SQUILLACE: No, we didn't, Judge. And I may
9 suggest that that is actually an exhibit that I believe the
10 defendants attached to their moving papers --

11 THE COURT: Okay.

12 MS. SQUILLACE: -- and obviously we can't control how
13 journalists paraphrase or piecemeal comments that are made in
14 an interview such as that. But, no, we did not say that it
15 became common afterwards. What we said was that even if it
16 became a common phrase after Mr. May created it, that did not
17 mean that the defendants' infringement did not occur and that
18 the defendants' infringement was not unlawful. And in fact, as
19 we cited to in our memorandum on page 21, the Supreme Court has
20 held in the case of *Feist Publications, Inc. v. Rural*
21 *Television Services, Co.*, 499 U.S. 345, "even if a copyrighted
22 work independently created by a party" -- which here would be
23 Mr. May -- "is copied by another party" -- any other third
24 party including the defendants -- "the motion should be denied
25 because there is an infringement of the copyright regardless of

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1 whether other independent and legitimate uses of the same
2 material exist." And that is even if you believe defendants'
3 argument that after he created it it is out there in the public
4 domain an infringement still occurred and the infringement is
5 still unlawful and actionable.

6 THE COURT: Let me go into that a little more because
7 that picks up on some of my other questions.

8 So let's use 1988 as a demarcation because that is
9 when your client or the complaint alleges that he created the
10 song, *We Run Things*, is that correct?

11 MS. SQUILLACE: That's when he created the song *We Run*
12 *Things*, but not the lyrics specific, Judge.

13 THE COURT: What I want to ask is, would you agree
14 that prior to 1988 the phrase "we run things, things no run
15 we," standing alone, just standing alone, that phrase itself
16 was not protectable under copyright law.

17 MS. SQUILLACE: No, Judge. We wholeheartedly
18 disagree.

19 THE COURT: So even the phrase by itself, even
20 standing alone from any song, just that phrase by itself you
21 are contending is copyrightable.

22 MS. SQUILLACE: Absolutely, Judge, because the case
23 law is clear that short phrases, in fact, just like "we run
24 things, things no run we" are protected by copyright law when
25 such short phrases are unique, original, and creative.

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1 THE COURT: Can you give me an example of any
2 phrase -- any copyright that's been issued for a phrase unto
3 itself, not part of a song, just unto itself.

4 MS. SQUILLACE: I absolutely can.

5 THE COURT: Okay.

6 MS. SQUILLACE: In fact, it was used in defendant's
7 song. Defendant used another copyrighted phrase that was
8 created and copyrighted by Slick Rick and Doug E. Fresh, and
9 the phrase is "LaDiDaDi." It is not a full sentence. It is
10 not even really a phrase. It is a mishmosh of sounds and
11 pronouns that are meshed together to create the LaDiDaDi. And
12 in that, defendants used that in their song, gave them due
13 compensation and due credit.

14 We submit, Judge, at that it unfortunately becomes a
15 business practice, because Mr. May is not as famous or as
16 popular or as known here, we submit that companies such as the
17 defendants' take the risk, the business risk, we will take this
18 language, we will take their lyrics, and if down the line they
19 found out about it, then we will deal with it then. They know
20 they could never not give due compensation and credit to Slick
21 Rick and Doug E. Fresh. That could never happen because they
22 are known, they are famous, and they are more popular and they
23 are more pronounced here in the United States. But that very
24 phrase, Judge, "LaDiDaDi," that is protected

25 THE COURT: But was that LaDiDaDi phrase from a song?

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1 MS. SQUILLACE: Yes. In fact, the song is entitled
2 *LaDiDaDi*.

3 THE COURT: Okay. So what I am asking is, did a
4 copyright issue for the phrase or did it issue for the song?

5 MS. SQUILLACE: Judge, I'm not sure whether the
6 copyright was for the entire song, but when you have a
7 copyright that is for the entire compilation of a song, it is
8 for all the lyrics in the song, just as we have here with
9 Mr. --

10 THE COURT: I don't disagree with that. I want to
11 understand how far your position goes.

12 Do you contend that a phrase unto itself, such as "we
13 run things, things no run we," independent of any songs, if
14 there had been no song, but just the phrase, the phrase itself
15 was not copyrightable under the copyright law of the United
16 States?

17 MS. SQUILLACE: Judge, he copyrighted it when he
18 copyrighted it here in the United States.

19 THE COURT: He copyrighted the song. I understand it
20 is part of the song.

21 MS. SQUILLACE: Correct.

22 THE COURT: Let's assume there is no song.

23 MS. SQUILLACE: Correct.

24 THE COURT: Just the phrase.

25 MS. SQUILLACE: Yes.

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1 THE COURT: He comes up with the phrase and he hasn't
2 created any song yet. Is the phrase itself protectable under
3 U.S. copyright law?

4 MS. SQUILLACE: It absolutely is, Judge.

5 THE COURT: So someone can take that phrase, even if
6 there is no song, and apply for a copyright on that phrase?

7 MS. SQUILLACE: Absolutely, Judge.

8 THE COURT: Can you give me an example where that's
9 been done, where there has been no song -- I'm not talking
10 about where it has been part of a song -- someone has come up
11 with a phrase. You can get a trademark on a phrase because it
12 is a slogan, but what about a copyright?

13 MS. SQUILLACE: Yes, Judge. Judge, I want to also
14 just point out that copyright protection doesn't just attach
15 when there is an actual copyright registration.

16 THE COURT: I understand that.

17 MS. SQUILLACE: Copyright law -- as soon as he made
18 and originated this unique, original, creative phrase in 1981
19 and he put it in tangible form and published it to the world
20 as --

21 THE COURT: As part of a song.

22 MS. SQUILLACE: No. He used it, Judge, by itself in
23 1981 as a hook, a segue, in the middle of his sets --

24 THE COURT: So --

25 MS. SQUILLACE: -- as a deejay.

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1 THE COURT: -- do you contend that those words by
2 itself, the phrase unto itself, is what gives it protection?

3 MS. SQUILLACE: Absolutely, Judge.

4 THE COURT: All right. Let me ask this. Can a
5 portion of a copyrighted work fall into the public domain?

6 MS. SQUILLACE: Well, the public domain is so vast, a
7 portion of it, of course, could wind up in the public domain in
8 some form, Judge.

9 THE COURT: And if it enters the public domain, can --
10 once that happens, isn't someone free to then incorporate it in
11 whatever they want to, because it has entered the public
12 domain?

13 MS. SQUILLACE: No, Judge, for two reasons. First, we
14 don't know -- we have to know how it entered the public domain
15 to begin with; and, second, as I just cited, the Supreme Court
16 case of *Feist Publications*, even if it enters the public domain
17 and exists in other areas and other even legitimate ways, for
18 example, if someone makes a commentary about it in an article,
19 that is a fair use of it because they are making commentary.
20 They are not taking it and putting the hook of Mr. May's song,
21 which is the mantra and theme of his song, and using it,
22 intentionally placing it as the hook and theme of the repeated
23 chorus in their song.

24 THE COURT: So when I say "public domain," I am using
25 that in the sense that it is free to use, that once something

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1 enters -- once something is in the public domain, it is free
2 for the public to use, not just the public sees it, but they
3 are free to use it. Again, my question is, are there
4 situations where a portion of a copyrighted work, that portion
5 falls into the public domain and can be used freely?

6 MS. SQUILLACE: I believe there are situations where
7 they could fall into the public domain. Whether they can be
8 used freely, Judge, is, I think, the question. As your
9 colleague Judge Stanton just ruled in the Ed Sheeran case,
10 there are material facts in dispute as to whether in fact in
11 that case Mr. Gaye's music was so in the public domain and so
12 commonly known that the defendants and Mr. Sheeran in that case
13 were free to use it and their use was fair use. That exact
14 issue was decided, your Honor, by this very same court,
15 Judge Stanton, in the Ed Sheeran case, *The Estate of Marvin*
16 *Gaye v. Ed Sheeran*, the very issue we have here. And
17 because --

18 THE COURT: I'm not sure that it's very issue. That
19 case is more like the Gaye case that was brought in California
20 involving *Blurred Lines*. Isn't that true?

21 MS. SQUILLACE: It involved more of an
22 instrumentality, yes, Judge. It is not lyric-specific.
23 However, the issue is in fact the same. There is not enough --
24 and we have no discovery yet, Judge. This is just on the
25 pleadings. We have no discovery. And when you take a look in

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1 that very same paragraph of 69 and 70 and you do it and you see
2 in the black-and-white comparison plaintiff's lyrics "we run
3 things, things no run we" and defendant's lyrics "we run
4 things, things don't run we," "no" and "don't," that's the
5 change the word. Defendants' change plaintiff's "no" to
6 "don't." The case law is clear, as we cited to, that is even
7 more than a trivial variation. "We shall overcome" --

8 THE COURT: I don't think this case is going to rise
9 or fall on that variation.

10 MS. SQUILLACE: Right, but when you see them side by
11 side, Judge, you see the taking is nearly verbatim. The
12 changing of the word "no" to "don't" is not enough to make it
13 fair use or a fair derivative use.

14 Not only that, Judge, what's important to note -- and
15 defendants do not address this at all -- it is not just that
16 they took the words "we run things, things," they change it to
17 "don't," "don't run we," they intentionally also took Mr. May's
18 use and creativity of the intentionally grammatically incorrect
19 sequence of the words. And when you look at the four factors
20 under fair use, sequence and arrangement of words is one of the
21 things you look to. They could have taken the words and
22 rearranged them in a whole new way to give a new meaning or a
23 new context. They did not do that. They took the exact same
24 words, changing "no" to "don't," which is really no change at
25 all because the meanings are the same, and they took the very

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1 same intentionally grammatically incorrect sequence of the
2 words to give rise to the same meaning, no difference, no
3 variation, no transformation to the meaning.

4 And one other thing, Judge, while theme is not
5 protected under copyright law, theme is looked at when you look
6 at the four factors of fair use and the purpose and character
7 of the use by the defendants. It is not a coincidence --

8 THE COURT: We are going to get to theme in a minute.

9 MS. SQUILLACE: Very good, Judge.

10 THE COURT: Going back to the public domain issue, on
11 page 22 of your brief in opposition, I quote the brief as
12 saying, "Plaintiff's original lyrics/lyrical phrase preexisted
13 defendants' unlawful use of same and was in the public domain,
14 as any Google or Internet search would reveal decades, before
15 the defendants' unlawfully took, copied, and used same in their
16 *'We Can't Stop.'*"

17 You have taken the position or asserted that the
18 phrase was in the public domain decades before the defendants
19 wrote their song. Why isn't that case dispositive here? Why
20 doesn't that just sort of resolve the whole matter?

21 MS. SQUILLACE: Because that doesn't mean that the way
22 they used it is lawful, Judge. His song existed when he
23 published that song in 1988 and it existed in the public
24 domain. This goes to access, Judge.

25 THE COURT: But a public domain has a meaning in

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1 copyright law, and it means that it has entered the free use by
2 the public. It's not just that it is out there to be seen.
3 That's publication. But public domain is I am free to use it
4 because it has entered public domain and is not protectable.

5 MS. SQUILLACE: Respectfully, no, your Honor, because
6 that would mean that every song that has ever been released in
7 the history of this entire world would be free for the taking
8 to be used --

9 THE COURT: No. It means it would be published, but
10 it doesn't mean that all those songs or all parts of them have
11 entered the public domain. And the words here are very
12 specific in your brief. It says they have entered the public
13 domain.

14 All right. It seems to me that you are giving a gloss
15 on public domain that's different from the way it is used in
16 copyright law perhaps, but I'm not -- maybe I'm wrong.

17 So I believe among the tests that one could apply in
18 copyright infringement, you allude to -- I think you allude to
19 fragmented literal similarity. Is that the test that you
20 contend applies here or is it some other test?

21 MS. SQUILLACE: Judge, that's one of what we look at.
22 When you have a short lyrical phrase and it's a fragmented part
23 of a song, you don't have to have the two entire songs be same
24 or similar, not all. So when you look at the songs as a whole
25 under the four-factor test for fair use, not all of the lyrics

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1 have to be same or similar in order for there to be --

2 THE COURT: Put aside fair use. What about for
3 infringement purposes? Is fragmented literal similarity a test
4 unto itself?

5 MS. SQUILLACE: Yes, it is, Judge.

6 THE COURT: Okay.

7 MS. SQUILLACE: It is one of the things that you look
8 to, then you look to the substantial similarity. That's why we
9 do the side-by-side, Judge, and that's why the case law is
10 clear. Where the copying is exact or nearly exact, there is an
11 actionable infringement. And, again, that goes back to
12 changing the "no" to the "don't" is not enough of a variation
13 for the defendants' use to be protected.

14 THE COURT: Okay.

15 On page 11 of your brief, you say, "The two works are
16 so nearly alike that the only reasonable explanation is that
17 the defendants copied Mr. May's work."

18 What are the two works you are referring to there? I
19 assume they are the entire song, is that correct?

20 MS. SQUILLACE: No, Judge, we are talking about the
21 phrases, and this, again, goes to --

22 THE COURT: But the copyright -- but the work that is
23 the subject of the copyright is the song, not the phrase.

24 MS. SQUILLACE: Judge, and part of that -- it is not
25 just that the entire song has to be the same. A copyright

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1 protection to the song protects all of the lyrics in the song
2 and all of the notes and instrumentalities and melodies of the
3 song, and thus everything that is a part of the song is
4 protected.

5 You need not have, as your Honor correctly noted in
6 our premotion conference, you need not have a *Blurred Lines*
7 case for there to be an infringement. He obtained his
8 copyright protection back in 1981 when he created the phrase
9 and used just the phrase, and he obtained additional copyright
10 protection when he published and created the song using the
11 phrase.

12 THE COURT: Right, but when you refer to "work" in
13 your brief -- and, again, this is a copyright convention that
14 is pretty much accepted, I would assume, but, again, you can
15 tell me if I am wrong -- "the work" refers to the song. That
16 is the subject the copyright. Isn't that the case?

17 MS. SQUILLACE: And the lyrics, Judge.

18 THE COURT: Well, I understand the lyrics are part of
19 the song, but the work is the song as a whole.

20 MS. SQUILLACE: The overall song is a work as a whole,
21 yes, Judge. But you can't piecemeal. The words are protected
22 and the melodies are protected.

23 THE COURT: Okay, but you say in here that "the two
24 works are so nearly alike in both syntactical structure and
25 lyrical content that the only reasonable, logical explanation

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1 for such a great degree of similarity is the defendants copied
2 from plaintiff." Isn't it just as likely or more likely that
3 the reason that they used that phrase is because it was already
4 existing in the public domain --

5 MS. SQUILLACE: No, Judge.

6 THE COURT: -- for decades.

7 MS. SQUILLACE: No, Judge. The reason why they used
8 that phrase -- and I'm glad you asked that question -- and,
9 again, it goes back to while theme is not protected, theme is
10 critical for this court to look at. Defendants try to assert
11 that these are two completely different songs. They are
12 actually not.

13 THE COURT: Wait a minute. But this isn't about
14 theme, though. This is just about what's the explanation for
15 why it appears in their song.

16 MS. SQUILLACE: Yes, Judge.

17 THE COURT: And I was just getting back to the issue
18 of public domain. But I think we have a disagreement there
19 about what the public domain is.

20 Let me ask, relatedly, you mentioned this earlier, you
21 mentioned a hook and that the phrase appears -- well, is the
22 phrase the hook or is it part of the hook? What do you mean
23 when you say it is in the hook or the hook.

24 MS. SQUILLACE: The hook is really what the theme of
25 the song or the theme of chorus would be. As I was saying

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1 earlier, Judge, and we discussed this also at the premotion
2 conference, it is not a coincidence that the theme of
3 plaintiff's song, which is about being in control of your own
4 life, your own destiny, your own situation, he may in his song
5 give different examples about how to be in control of your own
6 life versus the examples defendants give, but defendants' theme
7 of their song is about being in control of her own life and as
8 girls being --

9 THE COURT: Right, so --

10 MS. SQUILLACE: -- in control of their own life.

11 THE COURT: -- there is -- there are two different
12 glosses put on the theme of the song by the parties. You
13 contend that there is an overall theme of control of one's life
14 and independence; whereas, the defendants contend that, as used
15 by Mr. May, it is very much in the realm of male domination of
16 women and in a context of Ms. Cyrus's song, it is about female
17 independence, so sort of a subset maybe of the theme.

18 But here is my question about it. You, in your brief,
19 say that "the court" -- this is on page 13 -- "can take
20 judicial notice of the themes of the songs." The parties
21 disagree about what those themes are, so can I still make a
22 determination as to what the theme is? Can I independently
23 make that determination?

24 MS. SQUILLACE: Not on the 12(b)(6), Judge.

25 THE COURT: But you say I can take judicial notice.

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1 MS. SQUILLACE: You can. If you were to find, if you
2 were to be able to find that there is not fair use or there is
3 fair use, there is what must be looked at as part of the four
4 factors.

5 THE COURT: But putting aside whether it is fair use,
6 infringement, whatever, you have -- let me just go, to make
7 sure I have the wording right, let's see, I'm reading from page
8 13 of your brief. "This honorable court is allowed to take
9 judicial notice of the defendants' theme of their song, of
10 plaintiff's theme of his song, and of defendants taking and
11 copying plaintiff's theme."

12 So you have told me you I can take judicial notice,
13 but what if I determined that the theme is something other than
14 what you are contending it is?

15 MS. SQUILLACE: Judge, you can take judicial notice of
16 it as it applies to what you can rule on on this 12(b)(6), and
17 that is fair use and fair use only. We raise that in our
18 section of the motion as to substantial similarity. The reason
19 why they intentionally take Mr. May's song is because it
20 epitomizes the mantra of her song, and that is why they
21 intentionally place it in the repeated chorus of their song, as
22 does Mr. May.

23 We all know that the repeated chorus is what we all
24 learn the words to first as a listener because it is repeated
25 more than the verses are and the verses, while they have other

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1 words, reflect back to the chorus, because the chorus contains
2 the mantra or the theme of the song. Just like Mr. May's, so
3 does Ms. Cyrus's.

4 THE COURT: I'm looking at the lyrics for Ms. Cyrus's
5 song *We Can't Stop*, and the phrase "we run things, things don't
6 run we" appears in three places, right?

7 MS. SQUILLACE: Yes.

8 THE COURT: And it appears in what is apparently the
9 chorus of the song, is that correct?

10 MS. SQUILLACE: Yes.

11 THE COURT: But there are a lot of other things in
12 this chorus of the song. In fact, most of the chorus precedes
13 the statement, and there is reference to "this is our house,
14 this is our rules," and "we can't stop, we won't stop; can't
15 you see it's we who own the night, can't you see it we who bout
16 that life, and we can't stop," then it gets to "we run things,
17 things don't run we."

18 How in that context is "we run things, things don't
19 run we" the hook?

20 MS. SQUILLACE: Because, Judge, it exudes the exact
21 mantra: Be in control of your life. This goes back to, while
22 they give different examples of how to be in control of one's
23 life, the lyrics of Mr. May's song that talks about being
24 dominant to your women and women being subservient -- which is
25 a Jamaican cultural thing, by the way -- is only one portion of

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1 that song. This is not an antiwoman song.

2 THE COURT: It is more than one portion. It is.

3 MS. SQUILLACE: Judge, but it is not the mantra of the
4 song, it is not the theme of the song to be dominant over the
5 women. The theme is being in self-control. He gives that
6 example. The defendants give the example about if you want to
7 do drugs, do drugs, do mollie; if you want to have sex with
8 whomever you want, whenever you want, wherever you want, you
9 are a woman, it is your body, do what you want to do;
10 self-control; don't let society, life, life situations, or
11 other people dictate what you want to do, when you want to do
12 it, where you want to do it, and with whom you want to do it.
13 They are the exact same theme, Judge --

14 THE COURT: Okay.

15 MS. SQUILLACE: -- and that's what we --

16 THE COURT: Let me just turn briefly to the damages
17 issues.

18 MS. SQUILLACE: Yes.

19 THE COURT: Do you agree or disagree that the damages
20 available only go back three years before the filing of the
21 complaint?

22 MS. SQUILLACE: We conceded that, Judge.

23 THE COURT: Okay.

24 MS. SQUILLACE: Yes.

25 THE COURT: And with respect to the issue of

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1 attorney's fees and statutory damages and when registration
2 occurred versus when infringement case was brought, etc., I
3 think you bring up the continuing infringement theory in your
4 brief, is that right?

5 MS. SQUILLACE: We allege that the infringement
6 continued past, continuing to present, that it has continued.
7 However, I am glad that your Honor brought up this question
8 because of two things, Judge. First, the issue of whether
9 statutory damages and attorney's fees are applicable is not
10 ripe for this court to --

11 THE COURT: That may be but, I am just trying to
12 understand, the Second Circuit has rejected the continuing
13 infringement --

14 MS. SQUILLACE: Yes, Judge.

15 THE COURT: Okay.

16 MS. SQUILLACE: That is exactly why we have to
17 determine -- because we had no discovery yet, Judge, and this
18 is why the *Steele* case that they cite is not applicable, in the
19 *Steele* case plaintiff obtained default judgment against
20 defendants and was at an inquest trial for damages. We are not
21 anywhere near that stage.

22 THE COURT: All right.

23 MS. SQUILLACE: Secondly, in that case, why it is not
24 applicable here, in that case plaintiff conceded that her work
25 was unpublished. We have a published work here. It's been

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1 published decades before Ms. Cyrus was even born and before the
2 defendants use it.

3 And third, we must have discovery to see each and
4 every infringing act, whether it was the sale of an album,
5 the -- a performance, because it is not just the fact that
6 their album remains publicly on sale since it has been
7 released. That doesn't get the defendants out of liability.
8 She has performed this song continuously as part of her
9 repertoire, including promoting her new album with the hit
10 single *Malibu*. She performed it on *The Today Show*, and that is
11 a completely different genre and theme of music than the
12 song --

13 THE COURT: Well, it is an interesting --

14 MS. SQUILLACE: -- *We Can't Stop*.

15 THE COURT: -- question, right? The question is what
16 is a new infringement, right?

17 MS. SQUILLACE: Correct, Judge.

18 THE COURT: And if it is -- let's take a situation
19 where the record continues to be sold. The cases pretty much
20 say that is one infringement. You don't get to look at it
21 again just because a record was sold again a couple of years
22 later. What happens if it appears on a different album? Well,
23 that's another degree. What happens if it is performed live on
24 stage versus in a record? What happens if it's used in a
25 movie?

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1 What authority are you aware of that addresses whether
2 uses in different media in that way does or does not constitute
3 a new infringement?

4 MS. SQUILLACE: Judge, well, this is the very reason
5 why it can't be decided on this motion, because what we have to
6 look at is because in the *Steele* case she never published it
7 before copyright registration occurred, the issue of when she
8 registered it and when the post-registration infringing acts
9 occurred became crux to her damages issue for statutory
10 damages.

11 Here, because Mr. May's work has been published
12 before, while we do look at the certificate of registration and
13 see now what acts occurred after that, we must look at the
14 timing in order to determine whether those acts are part of a
15 continuing preregistration infringement or are they separate,
16 new, actionable infringing acts? And we don't have any
17 discovery as to that. It is not ripe. It cannot be decided at
18 this stage. At best and at most, they may be able to make a
19 motion after full discovery is complete for them to assert
20 these were all continuing acts of a preregistration
21 infringement. But we know no information yet and they don't
22 provide any, so this cannot be decided, most respectfully,
23 Judge, by your Honor on this motion.

24 THE COURT: Okay. Thank you.

25 MS. SQUILLACE: Thank you so much, Judge.

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1 THE COURT: Thank you, and I will come back to you if
2 you want to respond to whatever the defendants have to say.

3 MS. SQUILLACE: Thank you, Judge.

4 THE COURT: And the defendants don't get off the hook
5 here. I have questions for you, too. And, frankly, I think
6 the case would be easier if the plaintiffs had conceded that
7 the phrase "wi run tings," in the full Jamaican patois, had
8 existed beforehand and all that Mr. May had done was add
9 English elements to it, and I believe that in your brief that
10 was sort of an assumption you made in your brief. So (a) tell
11 me is that an assumption that (a) you did make; and (b) if that
12 assumption is incorrect, that is the reading of paragraph 69 of
13 the second amended complaint, does that change the outcome?

14 MS. PAUL: I will answer the second question first, as
15 you might expect and, no, it does not change the outcome one
16 way or another.

17 If I might, Judge, we frankly did not understand, even
18 given their second amended complaint, even given their response
19 to the premotion letter, even given their opposition brief,
20 what it is they are claiming he created and what he did not.
21 All we can go on -- I'm still not sure I understand, although I
22 heard the various denials that Ms. Squillace offered to your
23 questions, I'm still not sure I understand what he created and
24 what he didn't.

25 However, several things are true:

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1 First, it is clear and she stated that he claims to
2 have created it in 1981. It is equally clear that he did not
3 affix it until 1988, if then. Therefore, 1988, as I think your
4 Honor alluded to, is the critical time for purposes of
5 determining whether the phrase is in the public domain and
6 whether the phrase had been used by others previously.

7 The second thing that is clear is there is proof in
8 the record, both pre-1981 and certainly pre-1988, as their
9 brief concedes, the page you cited, that numerous others used
10 the phrase both in songs -- the *Nitty Gritty* song and in the
11 Johnny Osbourne song -- and, in addition, there are numerous
12 trademark uses of the phrase for various classes of goods and
13 services.

14 THE COURT: But the only -- isn't it the case the only
15 proof I have of that or only indicia of that are the
16 attachments and exhibits that you provided from various
17 publications, and therefore aren't those essentially hearsay
18 and items that I can't take into account on a motion to
19 dismiss?

20 MS. PAUL: Respectfully, Judge, they are judicially
21 noticeable. However, I would like to go to your last point,
22 which is where I began, which is, it does not make a difference
23 here whether or not he originated/created the phrase. It does
24 not make a difference for several reasons.

25 First of all, you said that you had taken the time to

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1 review our respective sets of papers and the exhibits. I
2 certainly hope the court has also had the opportunity to listen
3 to the two songs.

4 THE COURT: Well, I have heard -- I have listened to
5 the two songs. I have also read, I think, all of the cases
6 that were cited to as cases about phrases.

7 MS. PAUL: Okay. Listening to the two songs --

8 THE COURT: They sound nothing alike. There is no
9 question. But that's not what determines whether it is
10 infringement with respect to the phrase.

11 MS. PAUL: Respectfully, I disagree.

12 THE COURT: Well, they are not alleging that one song
13 infringes the other song as a whole. And I think, again, even
14 in the Gleaner article that counsel is distancing themselves
15 from at least they were quoted as saying even if they want to
16 distance themselves from it, maybe this wasn't said, but the
17 two songs sound nothing alike.

18 MS. PAUL: But, Judge, they have a copyright
19 registration, as you pointed out, for a song. They are suing
20 based on that registration.

21 THE COURT: Right. And if you have a copyright on a
22 work, it can be the case that there can be infringement for
23 copying a selected snippet of that work. And the best example,
24 I would think, are the sampling cases, where someone is taking
25 the actual sound recording of what may be, I don't know,

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1 anywhere from two to eight beats, I don't know what the common
2 use is in terms of length, and in those cases, there can be an
3 infringement. Let me start there. Is that right?

4 MS. PAUL: No.

5 THE COURT: No? Sampling --

6 MS. PAUL: First of all, I believe your Honor is
7 referring principally to the *Bridgeport* case out of, I believe,
8 the Sixth Circuit.

9 THE COURT: That's one case.

10 MS. PAUL: Pardon?

11 THE COURT: That's one of the cases.

12 MS. PAUL: And that case was based on the conclusion
13 of that circuit that, because of section 114 of the Copyright
14 Act, any taking of a digital sound recording is, by definition,
15 an infringement, because 114 gives the copyright owner of the
16 digital sound recording the right to remix, alter, or otherwise
17 change a work.

18 The Ninth Circuit expressly rejected that concept in a
19 Madonna case. I think it is *SalSoul v. Ciccone* and said it was
20 absurd -- Ninth Circuit's word -- to conclude that a provision
21 of the Copyright Act which was intended to be a limitation on
22 the rights otherwise accorded copyright owners in the case of a
23 digital sound recording and convert it into a greater right
24 than others would have to sample, to use other copyrighted
25 works.

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1 So the Second Circuit has not ruled on this question,
2 but I --

3 THE COURT: To be clear, you are saying the Second
4 Circuit has not ruled on the question of whether sampling is a
5 violation?

6 MS. PAUL: *Per se*, as opposed to the Ninth Circuit
7 ruling that the use of I think it was 40 times looped through
8 the first six seconds of the song or something like that was a
9 *de minimis* use in the Madonna case, the *SalSoul v. Ciccone*.

10 But what I am saying is that I agree that it is
11 possible that in some sampling cases, sampling by definition
12 being the taking of both the musical composition and the sound
13 recording, that the use of a relatively small snippet may
14 constitute substantial similarity, putting aside the issue of
15 whether, assuming substantial similarity, it might be fair use.

16 However, I am aware of no case in this circuit or
17 elsewhere that has held that the taking of a very small snippet
18 of a musical -- of the lyrics of a musical composition standing
19 alone can constitute or does constitute copyright infringement.

20 THE COURT: Putting aside -- you put that gloss
21 "standing alone." This goes to a question I have, which is,
22 what would justify a different outcome legally for a sampling,
23 as defined or exemplified by the taking of the actual sound
24 recording, in addition to the composition, versus just taking a
25 sample of the lyrics? And what rationale is there as to why

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1 there should be a different outcome?

2 MS. PAUL: Well, the very simple answer to that is
3 that, by definition, sampling is taking -- well, it is taking
4 three things. It is taking the musical composition, it is
5 taking the sound recording, and it is also taking the
6 particular performance of that sound recording. Using lyrics
7 is less of a use by a substantial measure; and, more
8 importantly, since a copyright registration for a song and the
9 registration on which they are suing here covers both the
10 musical composition -- well, covers the musical composition
11 which includes both the lyrics and the arrangement, the taking
12 is a lesser taking than it is in a sampling case. Now,
13 "lesser" doesn't mean home free, but "lesser" is "lesser," and
14 for that reason I don't think that reliance on the sampling
15 cases, even to the extent that there is a loose analogy there,
16 is appropriate.

17 What we are talking about here is the taking of a
18 phrase. Let's assume that he created the phrase. Let's assume
19 that, notwithstanding the fact that it is a short word or
20 phrase consisting of seven words, three of which are repeated
21 two times, somehow or other that short phrase is protectable
22 under copyright law. Even so, you still have to compare the
23 two works to see whether they exhibit the same aesthetic
24 choices. You still have to compare the two works holistically
25 in order to determine whether there is substantial similarity

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1 of protectable expression.

2 THE COURT: Is that true even under what is referred
3 to in some of the cases as a fragmented --

4 MS. PAUL: Yes.

5 THE COURT: -- similarity analysis?

6 MS. PAUL: Yes, it is.

7 THE COURT: So help me with that. Explain why that
8 is --

9 MS. PAUL: Because it is only one part.

10 THE COURT: Go ahead.

11 MS. PAUL: It is only the first stage of the analysis,
12 whether you are doing comprehensive nonliteral similarity,
13 which is overall structure without taking of specifics, or you
14 are doing fragmented literal, and I am not aware of a single
15 case where there has been a finding of infringement based on
16 one fragment, as opposed to multiple fragments, for fragmented
17 literal similarity.

18 But putting that aside, look at *Tufenkian*, look at
19 *Boisson*, look at numerous of the Second Circuit cases, not to
20 speak of the application of those precedents in music cases and
21 elsewhere. After you do the dissection, even under fragmented
22 literal similarity, you then turn to the holistic comparison.
23 Judge Nathan cited the *Peter Gaito* case, *McDonald v. Kanye*
24 *West*. Numerous, numerous cases both on the district court
25 level and in the circuit say that you don't stop at fragmented

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1 literal similarity when you hit upon a similarity that exists
2 in two works. You then have to do the holistic comparison,
3 look at the songs as a whole, and look at the relationship of
4 the choices made by the respective artists/creators as to how
5 to put those choices together in a song, and case after case
6 does this, Judge.

7 So I am saying that let's assume that it was created
8 by him and let's assume that it wasn't in the public domain and
9 let's assume that it is protectable, all of which are
10 assumptions that I am making for purposes of this argument,
11 nonetheless, the song aren't substantially similar. It doesn't
12 matter whether you look at the ordinary observer test to see
13 whether your average listener would, unless they set out to
14 identify the disparities, would see the overall aesthetic of
15 the songs as the same. It doesn't matter if you look at the
16 more discerning observer test which filters out all of the
17 elements except those that are protectable and then proceeds to
18 do the total concept in view of holistic comparison. It
19 doesn't matter whether it is comprehensive nonliteral or
20 fragmented literal. At the end of the day -- well, it's not
21 quite the end because there is still fair use, but for purposes
22 of determining whether there is substantial similarity, you
23 cannot get away from comparing the two songs as a whole.

24 THE COURT: So let me ask you about that. So in the
25 other cases involving phrases or allegations that a use of a

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1 phrase from one song in another song or some other work is an
2 infringing use, it did seem to me that many, maybe all, of
3 those cases that resulted in a dismissal was on summary
4 judgment. I'm going to have you correct me if I am wrong on
5 that. Because if you what you are saying is true for all
6 cases, then you would expect in every situation where someone's
7 claim of infringement is based on the use of a phrase from some
8 other work, that those would all be dismissed at the motion to
9 dismiss stage.

10 MS. PAUL: You could have a song that consists of
11 repetition of the same phrase for the entirety of the song.

12 THE COURT: Yes, but none of the cases have that.

13 MS. PAUL: Well, I am not saying that simply because
14 the phrase is the same means that they can't be substantially
15 similar. I'm saying that where, as here, the only similarity
16 alleged or that could be alleged based on the two songs is the
17 use of a common phrase --

18 THE COURT: But in several of the cases, and I don't
19 have the names handy, summary judgment was granted, perhaps
20 even denied, I can't remember, but even where it was granted it
21 was in cases similar to that situation where the only
22 commonality was the phrase, and those cases still made it to
23 summary judgment. My question is why?

24 MS. PAUL: I'm not aware of a case, frankly, in this
25 district that's made it past summary judgment that was based

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1 solely on a phrase. If I might, Judge, *Bell v. Blaze*, *Hip-hop*
2 *Behind the Walls*, 12(b)(6); *Boyle v. Stephens*, LifePath for
3 mutual funds, 12(b)(6); the *McDonald v. Kanye West* case that I
4 mentioned before, 12(b)(6). There are several others, but
5 these are the ones I happen to have notes on in front of me.

6 So I don't think that you need to go as far as you are
7 positing going in the questions either to me or Ms. Squillace
8 in order to reach the conclusion that, as a matter of law --
9 and there are many cases in this circuit and elsewhere reaching
10 the conclusion on an up-front 12(b)(6) motion -- that there is
11 not substantial similarity as a matter of law.

12 And I don't care if he created this phrase. I
13 actually think it is a very interesting question of Jamaican
14 law that I don't know the answer to as yet as to whether he can
15 have a copyright if he publicly performed either the song or
16 the phrase from '81 on, putting aside the question of whether
17 he entered the public domain. Under United States copyright
18 law, if he publicly used the phrase as a hook and/or as part of
19 a song for seven years before he tried to register it, it would
20 be in the public domain. But that ownership question is a
21 question of Jamaican law which is not before the court on this
22 motion.

23 We are simply saying that what matters is the status
24 pre-'88. Even if pre-'88 it was not in the public domain, it
25 is not protectable as a short word or phrase. And, by the way,

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1 Ms. Cyrus, defendants in this case did not use the exact same
2 phrase. And, in addition, defendants' use is for a very
3 different purpose that borders on fair use, which your Honor
4 said you were not addressing at this point.

5 THE COURT: I'm happy to have it addressed. I just
6 wanted to distinguish this being where we were in the issues.

7 MS. PAUL: To go back to your first question, there is
8 no substantial similarity here. Whether he --

9 THE COURT: There isn't in the songs, but I am still
10 having trouble with the cases that have -- I don't recall the
11 cases going down that path and saying that there is no
12 infringement in use of a phrase because there is no substantial
13 similarity in the overall work. Maybe one or two of the cases
14 have, but I don't remember that being the basis on which
15 overall the phrase cases have been decided.

16 MS. PAUL: Look at the *McDonald v. Kanye West* case
17 and --

18 THE COURT: That may be one.

19 MS. PAUL: -- look at the *Oyewole v. Rita Ora* case.
20 Both of those are Judge Nathan opinions. There are several
21 others which are cited in our briefs. And if you go through
22 the proper analysis, you first look at the similarity, you
23 identify the similarity -- actually take a step back. I will
24 take a step back, if I may.

25 The proper analysis begins with probative similarity,

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1 and you have to have probative similarity before you even get
2 up to substantial similarity; "probative similarity" being
3 copying enough similarities to show copying, whether the
4 copying is illegal or not; "substantial similarity" being --
5 "substantial similarity of protectable expression" being the
6 illegal taking, subject to the fair use defense.

7 So I do not believe, based upon listening to the
8 songs, reading their papers, looking at the lyrics of these
9 songs, that there is even probative similarity here, not to
10 speak of moving to the next level of the analysis, which is the
11 substantial similarity analysis which I have outlined.

12 And I am happy to address any other questions the
13 court has, but you cannot divorce the phrase from the song in
14 the way that plaintiff is attempting to do it in this case to
15 ground a copyright infringement action. This is not a
16 trademark infringement case. Yes, as your Honor pointed out,
17 you can have protection subject to the various fair use
18 defenses in trademark law for a phrase, a short phrase, a
19 slogan. But this is copyright, and you can only sue for what
20 is registered, and what is registered here is a song.

21 THE COURT: Okay. All right. Thank you.

22 Let me hear some rebuttal from the plaintiff on this,
23 because what the defendants have presented to me, at least as I
24 perceive it, is a very big statement, in a way, that this case
25 can easily be decided because of the lack of substantial

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1 similarity or even probative similarity between the songs as a
2 whole.

3 MS. SQUILLACE: If I may, most respectfully,
4 unfortunately counsel is incorrect. You can absolutely
5 fragment the phrase out.

6 I would turn to, first, Exhibit C to the summons and
7 complaint, which is attached as an exhibit. It is a copy of
8 the copyright registration for Mr. May of the 1988 song *We Run*
9 *Things* in which the phrase "we run things, things no run we,"
10 is included and --

11 THE COURT: All right. We know that.

12 MS. SQUILLACE: -- repeated in the song. Copyrighted
13 and protected under the registration on the first page,
14 paragraph 1, subsection b, "Description of the work protected,"
15 the second box is checked, "musical work including any
16 accompanying words." That gives the protection to the phrase
17 we are talking about here, Judge.

18 And you absolutely can isolate a phrase, which is why
19 the defendants knew that they had to give due compensation and
20 credit to Slick Rick and Doug E. Fresh for LaDiDaDi, because it
21 is a segmented, fragmented -- even more fragmented than
22 plaintiff's protected work here. It is not even a sentence.
23 It is not even really a phrase. It is a convoluted one word of
24 multiple pronouns and words mixed together to create a sound,
25 "LaDiDaDi." They know that they had to give them credit

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1 because fragmented and short phrases that are unique and
2 creative are protected by copyright.

3 I want to turn to counsel with regards to her argument
4 that the taking is *de minimis*, and I am glad that she brought
5 that argument back because here, again, the *We Shall Overcome*
6 case, which is a case they cite, it's a summary judgment motion
7 case, Judge, but the holding is critical to this case because
8 in that case the defendants change the plaintiff's word from a
9 phrase, not the entire song of all of the lyrics, from a part
10 of the song, the defendants in that case change plaintiff's
11 word of "will" to "shall" and change plaintiff's word of "down"
12 to "deep." And the Supreme Court was clear that this taking
13 was not enough of a variation to give the defendants
14 protection. It was not transformative. It was not a protected
15 derivative work.

16 THE COURT: But wasn't the overall song more similar
17 than in the case here?

18 MS. SQUILLACE: The overall songs themselves, Judge?

19 THE COURT: Yes.

20 MS. SQUILLACE: Not by much, Judge. This is, again,
21 it goes to the issue of whether these lyrics can be taken from
22 the particular song. If that were the case, then no lyrics
23 would ever be protected and you would have to have different
24 registrations and different copyrights for every single word of
25 a song and for every single note of a song separately, and we

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1 don't have that.

2 THE COURT: In *We Shall Overcome*, weren't they just
3 two different versions of *We Shall Overcome* essentially?

4 MS. SQUILLACE: That dealt more also with musicality,
5 Judge, which is different than here. We don't have that. But
6 when we go to what the holding of the case is and why they cite
7 it, the *de minimis* taking, it comes down to what transformation
8 did they make in their taking. As is here, it is such a
9 trivial change that it doesn't change the meaning. So that's
10 why --

11 THE COURT: I'm not worried about the change part, but
12 it could still be a *de minimis* taking, couldn't it?

13 MS. SQUILLACE: No, Judge, it is not *de minimis*.
14 That's why I give those examples from that case. Here we
15 change "no" to "don't." "No" and "don't" mean the same thing.
16 They are interchangeable.

17 THE COURT: It can be *de minimis* in terms of the
18 quantitative or is that only considered in the context of fair
19 use?

20 MS. SQUILLACE: That's in the context of fair use,
21 Judge.

22 THE COURT: Okay.

23 MS. SQUILLACE: Now, with regard to the cases that
24 counsel cited that were 12(b)(6) motions, those 12(b)(6)
25 motions, while they were 12(b)(6) motions, like the Kanye West

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1 case, the only issue decided on those 12(b)(6) was fair use,
2 not originality, not creation, not access, not whether it was
3 in the public domain, none of that, because it can't be
4 decided, Judge.

5 Briefly, to just go back, and this may clear up any
6 confusion if I confused the court, Judge, when we allege public
7 domain, when he published and recorded and put into the public,
8 publication, the song in 1988, that's what we mean when we
9 allege that any search by the defendants would have realized
10 who the author of that song and creator of the song was, that
11 they would then, just like they went to Slick Rick and Doug E.
12 Fresh, go search out Flourgon, find where he is, find who
13 represents him, if any recording company represents him, and
14 get his permission to use the song.

15 Because, Judge, we are at the 12(b)(6) stage and we
16 have no discovery, discovery will reveal -- and, again, this
17 goes back to the *Feist Publications* case, where there are other
18 legitimate uses of the protected or the work in dispute, here
19 the lyrics, discovery is going to show that the *Nitty Gritty*
20 song and the other song had permission, they had permission
21 from Flourgon to use this phrase. And, again, that's why *Feist*
22 *Publications*, the Supreme Court held --

23 THE COURT: Oh, actually I had a question about that,
24 which is, there is reference in your papers to a license
25 previously given by Flourgon, is that correct?

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1 MS. SQUILLACE: Correct, Judge.

2 THE COURT: And was the license for the song or for
3 only the phrase?

4 MS. SQUILLACE: It was for the phrase to use how they
5 want and any of the other lyrics in the song.

6 THE COURT: Was the license to the song as a whole?
7 In other words, they were licensed rights to use the song?

8 MS. SQUILLACE: To use the lyrics, Judge, to the
9 lyrics.

10 THE COURT: To the lyrics as a whole, though, all of
11 the lyrics. In other words, does the license specifically call
12 out and say: You may use the phrase, "We run things, things no
13 run we"?

14 MS. SQUILLACE: Yes, Judge. Yes, Judge.

15 THE COURT: Okay.

16 MS. SQUILLACE: Yes.

17 And, again, because we are at 12(b)(6), we don't have
18 any discovery, just like we don't have the discovery to show
19 the post-registration infringing acts and when they occurred to
20 now compare to the date of the registration.

21 But I also want to again go back to when a person
22 creates a work and puts it in tangible form and publishes it,
23 that person has copyright protection no matter what country
24 they come from for life plus 75 years, and that covers the time
25 frame the defendants infringed on the plaintiff's work.

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1 Going to the aesthetics that counsel raised and the
2 taking, when you look at the works as a whole, again, not all
3 of the lyrics have to be same or similar, not all the
4 instrumental notes have to be same or similar. And that is
5 why, as is here, the arrangement of the words, did they use the
6 same arrangement, did they use the same sequence, and here with
7 these lyrics of "we run things, things no run we" that they
8 changed to "we run things, things don't run we," they use the
9 same words, the same meaning, the same incorrect sequence and
10 arrangement of the words, and they also use the same rhyming
11 rhythm as the plaintiff. In the side-by-side comparison in the
12 complaint, the reason why we include the third line of the
13 chorus on plaintiff's side is "we run things, things no run we,
14 anything we do haffi done properly." He rhymes the third line
15 to the second line, not the first line. They do the same thing
16 on theirs. They could have rhymed the third line to the first
17 line or to the fourth or fifth line. So they are taking the
18 sequence, the arrangements of the words, the inflection, the
19 cadence, the theme, and the words without any derivative or
20 transformative change that would allow them any protection,
21 Judge.

22 And just if you give me one second to just look over
23 my notes.

24 (Pause)

25 MS. SQUILLACE: That's all, your Honor.

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1 THE COURT: Okay.

2 MS. SQUILLACE: Thank you.

3 THE COURT: Ms. Paul, one things I would like you to
4 address is the LaDiDaDi issue and if what you are saying is the
5 case with respect to what the law is and should be applied to
6 phrases, why was it necessary to obtain a license for that
7 phrase?

8 MS. PAUL: Well, you are assuming, Judge, that it was
9 necessary to obtain --

10 THE COURT: Well, I realize it may be to avoid
11 litigation because you don't think it is necessary, but
12 nonetheless.

13 MS. PAUL: Look at the Supreme Court in the
14 *Campbell v. Acuff-Rose* case. It specifically says, even if you
15 sought a license and it was denied -- what am I doing wrong?

16 THE COURT: Let the record reflect that what she did
17 wrong was that she did not have the microphone closer to her.
18 Nothing else.

19 MS. PAUL: The *Campbell v. Acuff-Rose* case says there
20 are lots of reasons why people take licenses, and it is totally
21 irrelevant to the question of whether or not it is a fair use.
22 The truth is that, in the music industry, people label, take
23 licenses for all kinds of things that if they picked up the
24 phone and called me that I would say, you don't need that,
25 that's so clearly a fair use. The truth is that there are

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1 customs that are sometimes followed, protocols that are
2 sometimes followed. It has nothing to do with what the
3 applicable law is. The LaDiDaDi business is totally irrelevant
4 to any issue that is or could be before this court.

5 THE COURT: What bothers me is that if the law were so
6 clear that a phrase -- you have to look at the overall song,
7 compare the overall songs, then a phrase or a sample, whatever
8 it is, it would just never be -- it would be a clear matter of
9 law that that can't be copyright infringement. The cases don't
10 go that far.

11 MS. PAUL: They don't go that far because -- I'm not
12 sure that they don't go that far. But, as a general
13 proposition, I am not aware of a single case where there was
14 use of one phrase with no other similarity, whether in musical
15 arrangement or in lyrics, that's not a digital sampling case,
16 where a court or a jury found that that was insufficient to
17 constitute substantial similarity. There are cases on the
18 specific facts of those cases where the court said there is a
19 jury question as to whether given the qualitative and
20 quantitative importance of the phrase to the plaintiff's song
21 and given other overall similarities, such as similarities in
22 sequencing -- I must say, Ms. Squillace keeps quoting the *Feist*
23 case. *Feist* stands for the proposition that you can have
24 protection for something that isn't otherwise copyrightable if
25 there is something original about the selection, order, and

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1 arrangement --

2 THE COURT: It's a compilation case.

3 MS. PAUL: It is a compilation case. Even then,
4 protection is so thin as to be, some cases say, anorexic. So I
5 don't get what *Feist* has to do with any of this.

6 My colleagues point out that in the LaDiDaDi examples,
7 and I don't really think this makes a difference because I
8 don't think it is relevant, there was also a taking of the
9 melody, and there is no taking of a melody here. But again,
10 people take licenses for lots of reasons. It doesn't mean that
11 something is or is not a --

12 THE COURT: I understand. I understand.

13 MS. PAUL: Just a couple of things I wanted to briefly
14 address.

15 Ms. Squillace said, among other things, that *de*
16 *minimis* is only relevant to fair use. I just think we need to
17 clear that up. I assume although the court may well be aware
18 of it, as Judge Newman pointed out in the *Reingold* case, there
19 are two very separate analyses. One is assuming substantial
20 similarity is the use *de minimis* separately from that, even if
21 it isn't *de minimis*, is it a fair use?

22 THE COURT: Or is it *de minimis* apart from fair use?
23 Do we look at the importance of what was taken to the original
24 work, that is, the work from which it was taken, or are we
25 looking at it in terms of quantitative or qualitative

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1 contribution to the alleged infringing work?

2 MS. PAUL: The latter, as opposed to on the fragmented
3 literal similarity where the focus is on the importance to
4 plaintiff's song. But if you are talking about a *de minimis*
5 use, then you are looking mostly in the cases quantitatively
6 rather than qualitatively, but I can imagine there could be a
7 case where qualitative was also the issue. Look at the *Sea of*
8 *Love* case, with the use of the pictures on the wall in the Al
9 Pacino movie and the court said -- I think that was a
10 Judge Stein decision, the court said it was a *de minimis* use.

11 THE COURT: But in the *Reingold* case it was the
12 opposite, right? Picture on the wall, *Cosby Show*.

13 MS. PAUL: Picture on the wall, up there throughout a
14 good part of the movie. They clipped off the copyright
15 registration in the lower right-hand corner. It was really
16 important to see --

17 THE COURT: Right. So why aren't these all
18 fact-specific issues, though, as to what is actually *de*
19 *minimis*?

20 MS. PAUL: Can there be fact-specific issues in a
21 given case? Yes. Are there fact-specific issues in this case?
22 I respectfully submit there are not. We didn't put a lot of
23 emphasis -- I do think the use is probably *de minimis*, but I
24 don't think you have to go that far because it is so clearly a
25 fair use in this case.

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1 THE COURT: Let me stop you there, because we didn't
2 directly address fair use. I don't want to take up too much
3 more time, but I want to ask counsel, to the extent you have
4 something to say about fair use that's not among what we have
5 already discussed, I want to give you an opportunity to address
6 that. But you don't need to give me the full run down on fair
7 use, because I am aware of the factors, I am aware you have
8 what you said in the briefs, and I am aware of some of the
9 issues that are common to what we have been talking about. But
10 there may be something particular that sets it apart or that we
11 haven't addressed that I would just like to hear about.

12 MS. PAUL: There is something that we touched on in
13 our brief, but it's come up so many times today in plaintiff's
14 argument that I would like to say it again. You have to focus
15 on when does the phrase matter and when does the song matter
16 for purposes of the analysis. And plaintiff takes the position
17 that all you look at for purposes of deciding whether there is
18 a transformative use or not is the phrase; that the songs are
19 totally irrelevant, their brief says. How could that be? How
20 can you possibly determine whether it is being used for a
21 transformative purpose, whether it supplants the demand for the
22 original, whether it adds something new with new meaning, new
23 aesthetics, all of the language that we have got from
24 Judge Laval on down with regard to transformative analysis, how
25 can you possibly decide that without looking at the entirety of

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1 the song?

2 THE COURT: Well, you do because if I recall --
3 correct me if I am wrong -- the quantitative part of that, that
4 is, the amount taken, is done in relation to the original song
5 as a whole.

6 MS. PAUL: That's the third factor. I'm talking about
7 the first factor.

8 THE COURT: Oh, okay. I'm sorry.

9 MS. PAUL: I'm saying for purposes of deciding whether
10 something is transformative or not, you can't just look at the
11 phrase to determine whether we transform the phrase. You have
12 to look at the way the phrase is used in each of the two songs.

13 THE COURT: Right. Hence their argument about theme,
14 but nonetheless.

15 MS. PAUL: Right. Putting that aside, I'm not going
16 to repeat what we have said about theme.

17 Second factor, the nature of the copyrighted work.
18 What's the work here? The work is their song, including the
19 musical arrangement of the song as well as the lyrics of the
20 song. You don't just focus on how unique the phrase is. I
21 think the song, their song, is quite unique -- well, unique not
22 being a copyright word, but creative. It also is published and
23 it's also, by their own admission, been out there without being
24 affixed from '81 to '87 and used by many others, they claim,
25 subsequent to '88.

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1 Third factor, the court just pointed out, amount and
2 substantiality of the taking. You have to look not just at the
3 taking of the phrase, but how much of the lyrics has been
4 taken, how much of the musical composition. No other lyrics
5 taken, no allegation of taking of musical composition in any
6 sense that has ever been protected by any court under copyright
7 law.

8 Fourth factor, it is not the impact on the market for
9 the phrase, it is the impact on the market for the work, the
10 actual or potential market for the work and, under some of the
11 cases, or derivatives thereof. *Cariou* sort of dismisses the
12 idea of an impact on the derivative market. But, again, it
13 doesn't make a difference here.

14 So I think, unless the court has questions, I'm
15 perfectly prepared to rest on what we have said about fair use.
16 I think fair use, just like substantial similarity, is an issue
17 that is decidable on 12(b)(6), presents no issues of fact, no
18 amount of discovery is going to change those things, so I am
19 prepared to rest on the arguments, but I thought it was
20 important to point out the distinction of focus on the phrase
21 as opposed to focus on the song.

22 THE COURT: Thank you.

23 MS. PAUL: And if I might do one more thing, no amount
24 of discovery is going to change the fact that this is, in the
25 words of Justice Ginsberg in the *Petrella* case, continuing harm

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1 from the same wrong. What is the wrong that is alleged? The
2 wrong that is alleged is the reproduction, distribution,
3 performance of the song.

4 THE COURT: In all cases that are alleged as to an
5 infringement, it is the song just happens to appear in
6 different places in different ways, either in through either
7 performance or some other --

8 MS. PAUL: Correct.

9 THE COURT: -- use.

10 MS. PAUL: And that's, under the rolling approach that
11 the Second Circuit endorses instead of the continuing wrong
12 approach, that's all subject to the bright-line rule on
13 statutory damages.

14 THE COURT: I'm forgetting which case it was, but one
15 of the cases that addresses that at the -- I think at the end
16 of that analysis, cabined the holding to saying in this
17 situation, where it is the same medium, then it is just one
18 infringement which tacitly suggests, perhaps, that in a case
19 where the same use is made in different media that you might
20 have multiple infringements.

21 MS. PAUL: I think the case law does not support that.
22 There are cases -- I have been involved in cases, different
23 field, but involving lines of clothing and you come up with a
24 T-shirt and then you come up with a sweatshirt and then you
25 come up with a baseball cap and are those new fringing acts for

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1 purposes of triggering a new availability of statutory damages,
2 and the vast majority of the cases say no. But it is not
3 consistent and there are cases, some of which we have cited,
4 saying that continuing to perform the same song, rerelease the
5 same record, all of that is continuing harm.

6 THE COURT: Right.

7 MS. PAUL: And Justice Ginsberg's opinion in *Petrella*,
8 granted it is *dicta* because that case was about *laches*, but
9 it's clearly controlling here and fully consistent even with
10 the discovery rule under the Second Circuit precedence.

11 THE COURT: All right. Thank you.

12 So let me just give plaintiff's counsel a chance to
13 just address the fair use point I made before, not a full
14 rendition of everything, just highlight anything you think you
15 either need to respond to what was said or that hasn't been
16 said already.

17 MS. SQUILLACE: Sure, Judge. And, again, not to
18 belabor points that we have already made in prior argument and
19 going back, when you look at the first factor, purpose and
20 character of the use, again, plaintiff's song has the phrase
21 nine times in his song. It is the theme of his song. It is
22 the mantra of his song. It epitomizes the overall theme of the
23 song. This is why, when determining fair use, which is the
24 only thing this court can decide on the 12(b)(6), theme is
25 important for that reason only. We are not claiming that theme

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1 is protectable, but you must look at the overall theme of the
2 song as you look to the both songs as a whole. You cannot
3 ignore theme, as defendants would like to do. They purposely
4 and intentionally placed it in the very same place in their
5 song -- the repeated chorus, the mantra of the song the theme
6 of the song, the epitome of her song and her theme, both themes
7 being being in control of your own life, your own destiny, your
8 own situation and don't let others, society, or life itself
9 dictate your own life and how you live your life.

10 THE COURT: I understand that argument. I have to
11 say, when I listened to the songs, and it may just be the
12 recording that I have, the phrase was probably the least
13 emphasized part of the chorus. There were other parts that
14 were much stronger and called out that theme. And the only
15 reason I really heard or understood what was being said in
16 regard to the phrase is because I was looking for it. But
17 nonetheless, I'm not going to make a judgment at this point
18 about what the recording quality is or isn't.

19 MS. SQUILLACE: Okay, Judge.

20 So obviously in the factor one and it is important to
21 point out, as the court is well aware and the case law is
22 clear, that no individual or coupling of the factors is
23 dispositive. You must look at all four factors together.
24 There is not one single factor or grouping of factors -- one
25 and three or four and two -- that is dispositive. You must

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1 look at everything.

2 So in furtherance of factor number one, important to
3 note is this being used for a commercial nature or profit
4 nature or not profit nature? Obviously the use is being used
5 for a commercial profit-generating nature.

6 When you look, too, at the nature of the copyrighted
7 work, not, again, to belabor the point, but from when he
8 created it in tangible form, the phrase "we run things, things
9 no run we" in 1981, he obtained copyright protection.

10 THE COURT: Well, wait. He created the song in 1981
11 or the phrase?

12 MS. SQUILLACE: The phrase, Judge.

13 THE COURT: Okay. But the song wasn't created until
14 1988, right?

15 MS. SQUILLACE: Correct.

16 THE COURT: I don't think -- look, we talked about
17 this a little bit. It is my understanding -- and maybe I am
18 wrong, but I will take a look -- that he had no copyright
19 protection in the phrase itself unless and until it was part of
20 the lyrics, in which case it is part of the overall lyrics.
21 But between 1981 and '88, he had nothing.

22 MS. SQUILLACE: Judge, we respectfully disagree,
23 because what is tangible form? If I create a lyric and I
24 produce it and I publish it by singing it, that is tangible
25 form, and I have obtained copyright protection.

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1 THE COURT: The copyright is on the song, not the
2 phrase by itself. I cannot get copyright protection for that
3 phrase. If I go to the copyright office and I have this unique
4 phrase that I came up with that's really cool and original and
5 it is ten words long and I say to the copyright office, I want
6 a copyright on this, they are not going to give that. They
7 might give me a trademark if I applied for a trademark.

8 MS. SQUILLACE: Correct, Judge, but that's why it is
9 important to note Mr. May's copyright registration. Defendants
10 focus on the musical original --

11 THE COURT: I understand, but many registrations say
12 that and of course everyone claims that their entire work is
13 protected, all the lyrics therein.

14 MS. SQUILLACE: Correct. So we can't ignore that,
15 Judge, which is important to note. It says "any of the words
16 accompanying the musical work in the arrangement." So that
17 clearly covers the lyrics in question here.

18 As to the amount and substantiality of the portion
19 used in relation to the copyrighted work, again, as the court
20 is well aware, this looks to plaintiff's work. How much of it
21 was taken from plaintiff's work? He uses it nine times in the
22 song. It is a lot. Even though they use it three times, that
23 is not dispositive of that factor. It is how many times and
24 how substantial is it in his work? So we have that and we have
25 pled that with specificity.

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1 And then the fourth factor, which is the effect of the
2 use upon the potential market, at best and at most, Judge,
3 defendants' papers may have raised a general issue of material
4 fact in dispute as a potential market, but clearly plaintiff's
5 music is dancehall dance music and defendants' music is
6 dancehall dance music, and discovery is needed to see the
7 effect of --

8 THE COURT: They are both dancehall dance music, but
9 is anyone really going to say that the market for the song *We*
10 *Run Things* by Mr. May is displaced in any way or faces any
11 threat of dislocation because of Ms. Cyrus's song?

12 MS. SQUILLACE: Yes, Judge. And in fact, this goes
13 back to when we talk about it being published. If you were to
14 Google "we run things, things no run we now," Ms. Cyrus comes
15 up for about 30 pages on the Internet before Flourgon. So the
16 effect on Flourgon and his market and his fans absolutely is
17 there. But, again, at best, all they raise is a triable issue
18 of genuine fact in dispute which, again, means their motion has
19 to be denied. And, again, this one-fourth factor in and of
20 itself by itself is not dispositive.

21 And when you look, again, the *Campbell v. Acuff-Rose*
22 case, as defendants also cite, you can't have one factor
23 dispositive and when looking at side by side, when you talk
24 about transformative use, you look at what the defendants took
25 from plaintiff, this is what you must look at when you talk

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1 about determining whether it is fair use. In order to be fair
2 use, it must transform the meaning in the defendants' work from
3 the meaning that it has in plaintiff's work and, again, it does
4 not. "We run things, things no run we" means the same thing as
5 "we run things, things don't run we," in and of itself and as
6 it is used as the repeated mantra of the theme of the song in
7 the repeated chorus. It does not change the meaning of being
8 in control of one's life, which is the theme of defendants'
9 song, and it is the same use of it in plaintiff's song. That
10 is what must be looked at when looked to see whether it is fair
11 use. Does the defendants' change of the word "no" to "don't,"
12 is that enough of a variation to transform the meaning of the
13 phrase and the meaning of the phrase within the meaning of the
14 song, and it absolutely does not. Which by the way, Judge, we
15 believe is why really plaintiff would be entitled to judgment
16 as a matter of law, determining fair use. But, again, at best
17 and at most, the defendants raise general issues of material
18 fact in dispute which would warrant a denial of granting their
19 motion at the 12(b)(6) stage, your Honor.

20 THE COURT: All right.

21 MS. SQUILLACE: Thank you.

22 THE COURT: All right. The court is going to reserve
23 decision and give it due consideration and issue an opinion in
24 due course.

25 Anything else?

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1 MS. SQUILLACE: No, your Honor.

2 MS. PAUL: No, your Honor. Thank you very much for
3 your time.

4 MS. SQUILLACE: Thank you, your Honor.

5 THE COURT: Of course. Thank you. We are adjourned.

6 MS. SQUILLACE: And Happy New Year.

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